IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs February 20, 2007

STATE OF TENNESSEE v. DAVID ROBERT BLEVINS, ALIAS

Appeal from the Criminal Court for Knox County
No. 74600 Ray L. Jenkins, Judge

No. E2006-00830-CCA-R3-CD - Filed April 19, 2007

The Defendant, David Robert Blevins, alias, was convicted by a Knox County jury of Class D felony theft. He received a two-year probated sentence, and the trial court ordered restitution in the amount of $1887.00. In this appeal as of right, the Defendant argues that: (1) the evidence is insufficient to support his conviction and (2) the amount of restitution is excessive. After a review of the record, we conclude that the evidence is sufficient to support the Defendant's conviction for theft. However, restitution is reduced from $1887.00 to $1358.00. Otherwise, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed as Modified

DAVID H. WELLES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ALAN E. GLENN, JJ., joined.

Mark E. Stephens, District Public Defender and Robert C. Edwards, Assistant Public Defender, for the appellant, David Robert Blevins, Alias.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; and Randall E. Nichols, District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

In January of 2000, the Defendant and his wife rented a mobile home from Ernest and Nancy Robins in Knox County—Lot 20 of Oak Haven Mobile Home Park. The mobile home was furnished with a stove, refrigerator, washing machine, and clothes dryer. After several months, problems developed over the Blevins' failure to pay rent. Ultimately, the Blevins vacated the premises in early November of 2000. When Mrs. Robins surveyed the premises, she discovered that the refrigerator, stove, washing machine, dryer, and other items had been removed from the mobile home.

A Knox County grand jury indicted the Defendant on April 17, 2002, charging him with theft of property valued between $1000 and $10,000, a Class D felony. See Tenn. Code Ann. §§ 39-14-103, -105. A jury trial was held in February of 2006.

The State's first witness was Nancy Robins, and she testified regarding the lease agreement with the Defendant and his wife. Mrs. Robins testified that the Blevins paid $350.00 per month in rent—$200.00 to rent the mobile home and $150.00 to rent the lot. Two documents were entered into evidence, one regarding rent for the mobile home and the other regarding rent for the lot. The rental agreement pertaining to the mobile home contained the following hand-written provisions: the Blevins made a $500.00 deposit; the mobile home contained a working smoke alarm and fire extinguisher, which provision was initialed by the Defendant; and the mobile home was furnished with a stove, refrigerator, washing machine, and clothes dryer. Mrs. Robins stated that her attorney prepared the documents but that she filled them out. Mrs. Robins testified that it was the Blevins' signatures which appeared at the bottom of the document and that they signed it in her presence. All of the aforementioned hand-written provisions appeared immediately above the signature line and, according to Mrs. Robins, the provisions were placed on the agreement prior to the time the Blevins affixed their signatures at the bottom of the document. Mrs. Robins testified that Mrs. Blevins stated that "she was glad that it had a washer and dryer because she had the two children. She needed one for them." Mrs. Robins acknowledged that there was a "Lease with Option to Purchase" document but stated that it was never signed by the Blevins.

Mrs. Robins testified that, after the Blevins moved out, she went to view the trailer on November 9. After she went inside, she observed that "everything was gone. The stove, refrigerator, washer/dryer, vents from the floor, receptacles from the wall. The stove vent, the fan. The lights from the living room wall." Mrs. Robins then photographed the residence, and the photos depicting the areas where the items should have been were admitted into evidence. Mrs. Robins testified that the Blevins did not have permission to remove these items from the mobile home.

Mrs. Robins produced a document from A-Plus Homes labeled "invoice," which reflected the sale of a stove, refrigerator, washing machine, and dryer to Oak Haven Mobile Home Park. The document was dated November 3, 1999, and showed a total sales price of $1250.00. Mrs. Robins also testified that the Blevins owed late rent in the amount of $855.00. Mrs. Robins listed the following additional losses: (1) floor vents—$25.00; (2) stove vent cover—$10.00; (3) living room and bedroom lights—$30.00; (4) broken window in the back bedroom—$34.00; (5) window in second bedroom sealed with "silicone"—$45.00; (6) outlet covers—$8.00; (7) toilet seat—$10.00; (8) "electric box cover"—$25.00; and (9) clean-up and labor costs—$475.00.[1]

On cross-examination, Mrs. Robins acknowledged that the word "stove" on the rental agreement was "written over with blue ink" but explained that her pen "probably . . . wasn't working . . . ." She stated that she told the Defendant to initial the provision regarding the furnishings but that

[1] Although the amount listed on exhibit seven was $475.00, the trial court relied on the statements of counsel at the sentencing hearing and determined the amount to be $450.00.

the Defendant initialed by the fire extinguisher and smoke alarm provision instead. According to Mrs. Robins, she had the capability to provide tenants with a copy of the rental agreement, but she only did so if they requested a copy. She further testified that all tenants received a stove and refrigerator and that a washing machine and clothes dryer were optional "depending on the needs of the people . . . ."

The State then called Barbara Millholland, who lived in Oak Haven Mobile Home Park in 2000 and was neighbors with the Blevins. Ms. Millholland was familiar with the mobile home rented by the Blevins because she "knew the people that lived there before." Ms. Millholland stated that, before the Blevins moved in, she was at the mobile home quite frequently and had used the appliances herself.

She recalled that, after the Blevins moved into the neighborhood, their children played together. Ms. Millholland testified that she visited the Blevins and that they "talked about [their] children . . . ." Ms. Millholland stated that the same appliances she had seen prior to the Blevins' arrival were still inside the mobile home when she visited the Blevins.

In November of 2000, Ms. Millholland was standing on her front porch and saw the Blevins moving from the mobile home park. She observed that the Blevins "had the refrigerator and the stove, and . . . the washer . . . was on the truck physically. And then the dryer was . . . on the ground already removed from the house just setting [sic] on the ground." She further testified that these were the same appliances she had seen inside the trailer but that she did not know the Blevins were taking the appliances without permission. Ms. Millholland admitted that she did not see any of the other items being removed from the mobile home.

The Defendant then testified on his behalf. He stated that he was married, had five children, and worked for a bonding company. The Defendant testified that he requested a copy of the lease from Mrs. Robins but that he did not receive one until "[t]hree months later" after he refused to pay—a copy of this purported document was entered into evidence.

The Defendant stated that he believed he "was supposed to have been buying" the mobile home from the Robins and that was why a $500.00 deposit was required. He testified that this belief was based upon statements by Mrs. Robins. He further asserted that he never signed a document regarding rent for the lot. The Defendant compared his copy of the lease with the one provided by Mrs. Robins. On the Defendant's copy, there was no provision relating to the refrigerator, stove, washing machine, and dryer.

The Defendant stated that the mobile home did come equipped with a washing machine and dryer but that they "broke when [they] moved in . . . ." He claimed that he placed the washing machine and dryer in the backyard per the instructions of Mrs. Robins and that Mr. Robins later removed the items. The Defendant likewise admitted that there was a refrigerator in the mobile home when he moved in but that Mr. Robins "came and picked it up because [he] told them that [they] had one, that [they] didn't need it."

The Defendant stated that they began moving from the mobile home park at 11:00 p.m. and that they finished around 4:00 a.m. According to the Defendant, he moved during these hours because he did not get off from work until 10:00 p.m. The Defendant stated that he acquired a washing machine and dryer from Rainbow Rentals and that this was the set he removed from the mobile home. The Defendant stated that he was leasing this set and that he finished paying for it after he moved out of the mobile home. The Defendant also claimed that the refrigerator they used in the mobile home was a gift from his wife's "god grandmother[,]" who had since passed away. He further asserted that he did not remove the stove, floor vents, electric box cover, outlet covers, or toilet seat from the mobile home. The Defendant stated that he did not break the window and that "[t]he back bedroom when [he] moved out had an air conditioner unit in the window." The Defendant also testified that he sealed the window in the second bedroom because that was where his children slept and he had "to keep the cold air from coming in, considering [he] didn't have heat."

The Defendant acknowledged that he owed the Robins rent money, although he disputed the amount. According to the Defendant, he encountered Mr. Robins after he moved from the mobile home park but Mr. Robins never mentioned any stolen items.

Next, the Defendant's wife, Kelly Blevins, testified. Mrs. Blevins confirmed that the refrigerator was a gift. Mrs. Blevins also stated that they were leasing the washing machine and dryer from Rainbow Rentals. She presented a certificate dated May 26, 2001, which reflected ownership of a washer and dryer set. According to Mrs. Blevins, she received this certificate when she made her "last payment" in May of 2001. Mrs. Blevins also claimed that her children did not play with Ms. Millholland's and that Ms. Millholland never came inside the mobile home while they lived there.

The defense called Robert Hogan, manager of Rent-A-Center, formerly known as Rainbow Rentals. He testified that he recalled doing business with the Blevins and that they rented several items from his store. He verified that the document provided by Mrs. Blevins appeared to be a certificate of ownership prepared by his store.

Mr. Hogan identified a Rainbow Rentals document which reflected the "unit history" of the washing machine and clothes dryer. He confirmed that the document showed an "agreement date" of October 27, 1997; that Kelly Blevins was required to pay $37.98 on a bi-weekly basis; that payments were made for thirty-four weeks; and that a total of $645.62 was collected. Mr. Hogan acknowledged that, based upon this record, the washer and dryer should have been paid off in 1998. He testified that the certificate would have been presented in May of 2001 "[i]f they would have come in . . . and asked for it . . . ."

The last defense witness was Mr. Ernest Robins. He testified that he sent a letter to the Blevins in October 2000 about the late rent. He admitted that he stated in the letter he would "use any means available to collect . . . ."

On cross-examination, Mr. Robins asserted that he only meant legal action in the letter. Mr. Robins stated that the Defendant never informed him the washer and dryer did not work and that the Defendant was never instructed to place the set in the yard. According to Mr. Robins, any problems with the heat had been addressed and remedied.

Following the conclusion of proof, the jury found the Defendant guilty as charged. A sentencing hearing was held on March 30, 2006, and the Defendant received a two-year sentence as a Range I, standard offender to be served on probation. The judgment form reflected that the trial court also imposed restitution in the amount of $1877.00.[2]

This appeal followed.

Analysis

I. Sufficiency

First, the Defendant contends that the evidence is insufficient to support his conviction for theft of property valued at $1000.00 or more but less than $10,000.00. Specifically, he argues that the jury ignored "portions of the proof submitted by the defense [which] remained unrebutted . . . ." The Defendant asserts that verdict "makes no sense and does not reflect rational decision making" relying upon the following rationale:

> The record . . . contains unrebutted proof that [the lease agreement] was altered to the detriment of the [Defendant] with a strong suggestion that the alteration occurred at the hands of the alleged victim. Furthermore the [Defendant and his wife] had no need to steal a washer and dryer having already acquired one from Rainbow Rentals or a refrigerator since the[y] had been given one as a gift.

Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

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[2] The trial court announced a sentence of eleven months and twenty-nine days at the sentencing hearing. However, the Defendant was convicted of a Class D felony as a Range I, standard offender, which carried a range of two to four years. See Tenn. Code Ann. § 40-35-112. The Defendant received the minimum sentence in his range, and the judgment form reflected the appropriate sentence.

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or reevaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

A person is guilty of theft if that person, with the intent to deprive the owner of property, knowingly obtains or exercises control over the property without the owner's effective consent. Tenn. Code Ann. § 39-14-103. Essentially, the Defendant's argument is based upon his contention that the State's witnesses were not credible. He asserts that "[t]he jury would have to believe that the testimony offered by the [Defendant] and his witnesses was totally false in order to find him guilty." This argument is misplaced as the credibility of witnesses and reconciliation of conflicts in the testimony are matters "entrusted exclusively to the jury as the triers of facts." State v. Oody, 83 S.W.2d 554, 558 (Tenn. Crim. App. 1991). Obviously, based upon the verdict, the jury chose not to accredit the testimony of the Defendant or his witnesses.

In the light most favorable to the State, the evidence established that, at the time the Defendant moved into the mobile home, it was furnished with a stove, refrigerator, washing machine, clothes dryer, and other items. When the Defendant vacated the premises some months later, Mrs. Robins discovered that these items had been removed from the residence. Mrs. Robins testified that the provision regarding the appliances appeared on the lease at the time the Defendant and his wife signed the document. Ms. Barbara Millholland stated that she was familiar with the appliances in the mobile home and that she saw the Defendant take these appliances from the residence when he moved. Mr. Robins testified that the Defendant never informed him of any problems with the washer and dryer set and that he did not instruct the Defendant to place the set in the yard. Finally, Mrs. Robins stated that the Defendant did not have permission to remove the appliances from the mobile home and established that the value of the appliances alone was over $1000.00. The jury chose to accredit the prosecution witnesses' testimony. It is not within our province to re-weigh or reevaluate the evidence presented. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. We conclude that the evidence is sufficient to support the theft conviction.

II. Restitution

As his other issue on appeal, the Defendant contends that $1887.00 was an excessive amount of restitution. At the sentencing hearing, the State requested restitution for the Robins, relying on the testimony of Mrs. Robins and the exhibit filed during the course of trial, which claimed total losses in the amount of $2767.00. At some point, the Robins apparently also requested attorney fees in the amount of $50.00. The State acknowledged that attorney fees and late rent were not proper

for a restitution award in this case. The trial court simply stated "[o]kay" in response to the State's comments and request for restitution.

The Defendant then asked that the trial court deduct the $450.00 in clean-up and labor costs from the award. The State responded, "It's something that they had to spend to clean up when they went in there, Judge, so that's . . . why we're asking for that." The trial court simply stated "[y]es" to the State's comment. The specific amount of restitution was never mentioned by the judge at the sentencing hearing. It appears that the restitution amount of $1887.00, reflected on the judgment form, was based upon the following calculation—$2767.00 minus $855.00 in late rent and minus $25.00 based upon a change in the amount of clean-up and labor costs.

When a defendant challenges the validity and amount of restitution, this Court must conduct a de novo review of both the amount of restitution ordered and the method by which it was determined. State v. Johnson, 968 S.W.2d 883, 884 (Tenn. Crim. App. 1997) (citing Tenn. Code Ann. § 40-35-401(d) (1990); State v. Frank Stewart, No. 01-C-019007CC00161, 1991 WL 8520, at *1 (Tenn. Crim. App., Nashville, Jan. 31, 1991)). The trial court is entitled to a presumption of correctness. Tenn. Code Ann. § 40-35-401(d).

A trial court, in conjunction with a probated sentence, may order a defendant to make restitution to the victims of the offense. See id. § -304(a). "The purpose of restitution is not only to compensate the victim but also to punish and rehabilitate the guilty." Johnson, 968 S.W.2d at 885. The statue that governs restitution as a condition of probation provides, in pertinent part, as follows:

> (b) Whenever the court believes that restitution may be proper or the victim of the offense or the district attorney general requests, the court shall order the presentence service officer to include in the presentence report documentation regarding the nature and amount of the victim's pecuniary loss.
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> (c) The court shall specify at the time of the sentencing hearing the amount and time of payment or other restitution to the victim and may permit payment or performance in installments. The court may not establish a payment or performance schedule extending beyond the statutory maximum term of probation supervision that could have been imposed for the offense.
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> (d) In determining the amount and method of payment or other restitution, the court shall consider the financial resources and future ability of the defendant to pay or perform.
>
> (e) For the purposes of this section, "pecuniary loss" means:
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> (1) All special damages, but not general damages, as substantiated by evidence in the record or as agreed to by the defendant; and

(2) Reasonable out-of-pocket expenses incurred by the victim resulting from the filing of charges or cooperating in the investigation and prosecution of the offense; provided, that payment of special prosecutors shall not be considered an out-of-pocket expense.

Tenn. Code Ann. § 40-35-304(b)-(e).

Special damages are those which are "'the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence.'" State v. Lewis, 917 S.W.2d 251, 255 (Tenn. Crim. App. 1995) (quoting Black's Law Dictionary 392 (6th ed. 1990)). General damages are those which are "'the necessary and immediate consequence of the wrong.'" Id. (quoting Webster's New International Dictionary 664 (2d ed. 1957)). It is unnecessary for the sentencing court to determine restitution in accordance with the strict rules of damages applied in civil cases. Johnson, 968 S.W.2d at 887.

The sum of restitution ordered must be reasonable and does not have to equal the precise pecuniary loss. State v. Smith, 898 S .W.2d 742, 747 (Tenn. Crim. App. 1994). There is no set formula. Johnson, 968 S.W.2d at 886. The sentencing court must consider not only the victim's loss but also the financial resources and future ability of the defendant to pay. Tenn. Code Ann. § 40-35-304(d); State v. Bottoms, 87 S.W.3d 95, 108 (Tenn. Crim. App. 2001). In ordering restitution, the trial court shall specify the amount of time and payment and may permit payment or performance of restitution in installments. Tenn. Code Ann. § 40-35-304(c). The court may not, however, establish a payment or schedule extending beyond the expiration of the sentence. Id. at (g)(2). If the defendant, victim, or district attorney petitions the trial court, it may hold a hearing and, if appropriate, waive, adjust, or modify its order regarding restitution. Id. at (f). Further, any unpaid portion of the restitution may be converted to a civil judgment. Id. at (h)(1); Bottoms, 87 S.W.3d at 108.

On appeal, the Defendant argues that the trial court erred by including $450.00 in clean-up and labor costs, $34.00 for the broken window in the back bedroom, and $45.00 for the sealed window in second bedroom.[3] He contends that the trial court should have imposed restitution in the amount of $1358.00[4]—the cost actually related to the theft. Specifically, the Defendant submits that the trial court "did not follow the legislative scheme for calculation of restitution by having the pre-sentence officer investigate this matter. . . . There is no proof in the record to explain how these

[3] The Defendant does not challenge the trial court's inclusion of the remaining items in the restitution award, and we agree that the record supports the inclusion of these items—$1250.00 for the appliances; $25.00 for the floor vents; $10.00 for the stove vent cover; $30.00 for the living room and bedroom lights; $8.00 for the outlet covers; $10.00 for the toilet seat; and $25.00 for the "electric box cover."

[4] The Defendant sets the amount at $1343.00. However, after deducting the contested items, the proper calculation is $1358.00.

three categories of figures relate to the offense with which the defendant has been convicted."[5] The State relies on State v. Moore, 814 S.W.2d 381 (Tenn. Crim. App. 1991), and submits that "[t]he trial court in this case had the necessary tools it required to set restitution, and it did not abuse its discretion by the manner in which it calculated same." We disagree with the State.[6]

First, we note that the presentence report is not included as a part of the record on appeal and, therefore, we are unable to determine whether the presentence report included "documentation regarding the nature and the amount of the victim's pecuniary loss" as required. See Tenn. Code Ann. 40-35-304(b). It is the Defendant's responsibility to prepare an adequate record for appellate review. See Tenn. R. App. P. 24(b); State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993). We also note that the Defendant did not object to the $34.00 for the broken window in the back bedroom and the $45.00 for the sealed window in the second bedroom. "Objections must be timely and specific." Tenn. R. Evid. 103, Advisory Commission Comments. Relief is not available to a party who is responsible for, or fails to take action to prevent, an error. Tenn. R. App. P. 36(a).

Nonetheless, the Defendant did object to the "clean-up and labor" costs, and we must conclude that the evidence presented was insufficient to establish the amount of these costs or that these costs were related to the crime of theft. See Bottoms, 87 S.W.3d at 108. Contrary to the assertions of the State, the trial court did not hear detailed testimony from the Robins regarding the cleaning and labor involved in repairing the mobile home. Indeed, the only testimony at trial was when Mrs. Robins' was asked, "Did you, in fact, replace them at your expense?" to which she responded, "Yes, we did. We had to make the home back, you know, liveable again."

> General statements by a victim regarding the amount of his or her loss containing no explanation as to how the victim arrived at the amount are insufficient. While a victim's testimony standing alone may be sufficient to establish special damages for the purposes of restitution, the victim should explain how he or she arrived at the amount of damages requested. Further, documentation supporting the victim's testimony is helpful.

State v. Jerry Lee Truette, No. M2005-00927-CCA-R3-CD, 2006 WL 2000540, at *3 (Tenn. Crim. App., Nashville, July 19, 2006) (quoting State v. Charles R. Turner, No. M2003-02064-CCA-R3-CD, 2004 WL 2775485, at *8 (Tenn. Crim. App., Nashville, Dec. 1, 2004)). The Robins did not provide any documentation concerning these cleaning and labor fees or offer any testimony as to how they arrived at this amount or how these costs related to the Defendant's theft.

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[5] The Defendant does not argue that he lacks the ability to pay restitution, and the record shows that the Defendant maintained steady employment working for a bonding company.

[6] Moore holds that a trial court's failure to order documentation regarding the amount of loss that could be attributed to a defendant in a presentence report was harmless error, when the defendant was given full consideration under the law regarding restitution in a subsequent hearing. Johnson, 968 S.W.2d at 335 (citing Moore, 814 S.W.2d at 384).

Moreover, the exhibit admitted at trial showed the amount of clean-up and labor costs as $475.00, while the trial court awarded only $450.00 based upon the statements of counsel at the sentencing hearing. "A victim seeking restitution must present sufficient proof so that a trial can determine with some reliability the amount of loss." Bottoms, 87 S.W.3d at 108-09. Accordingly, we conclude that the cleaning and labor costs have not been sufficiently established by the proof as a "natural and proximate" result of this theft. We further conclude that repair of the windows—$34.00 for the broken window in the back bedroom and $45.00 for the sealed window in the second bedroom—was neither a result of this theft nor follows as "a natural and proximate" consequence thereof. The restitution award is reduced by $529.00.

CONCLUSION

Based upon the foregoing reasoning and authorities, we conclude that the evidence is legally sufficient to support the Defendant's Class D felony theft conviction. However, the judgment is modified to reduce the amount of restitution from $1887.00 to $1358.00. Otherwise, the judgment of the Knox County Criminal Court is affirmed.

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DAVID H. WELLES, JUDGE